

SUBCHAPTER C : FINANCIAL ASSURANCE MECHANISMS FOR CLOSURE

§37.201. Trust Fund for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by establishing either a fully funded trust or a pay-in trust which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure), and submitting an originally signed duplicate of the executed trust agreement to the executive director.

(b) The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(c) The wording of the trust agreement must be identical to the wording specified in §37.301(a) of this title (relating to Trust Agreement for Closure) including a formal certification of acknowledgment as specified in §37.301(b) of this title.

(d) Schedule A of the trust agreement as specified in §37.301(a) of this title must be updated within 30 days after an approved change in the amount of the current closure cost estimate covered by the agreement, or annual inflation adjustments.

(e) A fully funded trust requires that the initial payment into the trust fund be at least equal to the current closure cost estimate, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the initial payment plus the amount of the combined mechanism(s) must be at least equal to the current closure cost estimate. A receipt from the trustee for the initial payment must be submitted by the owner or operator to the executive director with the originally signed duplicate of the trust agreement.

(f) A pay-in trust requires annual payments by the owner or operator over the term of the initial registration or permit, the remaining term of the initial registration or permit, or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter; this period is hereafter referred to as the "pay-in period." The payments into the closure trust fund must be made in accordance with this subsection.

(1) For a new facility, a receipt from the trustee for the first payment must be submitted by the owner or operator to the executive director in accordance with §37.31 of this title (relating to Submission of Documents). The first payment must be at least equal to the current closure cost estimate divided by the number of years in the pay-in period; or when a combination of mechanisms are used in accordance with §37.41 of this title, the first payment must be at least equal to the current closure cost estimate less the amount of the combined mechanism(s) divided by the number of years in the pay-in period. Subsequent payments must be made no later than 30 days after each anniversary date of the first payment. The amount of each subsequent payment must be determined by this formula.

$$\text{Next payment} = \frac{\text{CE} - \text{CV}}{\text{Y}}$$

Where CE is the current closure cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(2) The owner or operator may accelerate payments into the trust fund or he may deposit the full amount of the current closure cost estimate at the time the fund is established. However, he must maintain the value of the fund at no less than the value that the fund would have if annual payments were made as specified in paragraph (1) of this subsection.

(3) If the owner or operator establishes a trust fund after having used another financial assurance mechanism, the first payment must be at least equal to the amount that the fund would contain if the trust fund was established when the registration or permit was initially issued, and subsequent payments must be made as specified in paragraph (1) of this subsection.

(g) After the initial payment for a fully-funded trust or after the pay-in period is completed for a pay-in trust, whenever the current closure cost estimate changes, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 60 days after the change in the cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or obtain an additional financial assurance mechanism as specified in this subchapter to cover the difference.

(h) If the value of the trust fund is greater than the total amount of the current closure cost estimate, the owner or operator may submit a written request to the executive director for release of the amount in excess of the current closure cost estimate.

(i) Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsection (h) of this section, the executive director, if he approves the request, shall instruct the trustee to release to the owner or operator such funds in writing.

(j) After beginning closure, an owner or operator or any other person authorized by the executive director to perform closure may request reimbursement for closure expenditures by submitting itemized bills to the executive director. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to cover the maximum costs of closing the facility over its remaining operating life. After receiving bills for closure activities, the executive director shall instruct the trustee to make reimbursement in such amounts as the executive director specifies in writing, if the executive director determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the executive director has reason to believe that the cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, the executive director may withhold reimbursement of such amounts as deemed prudent until it is determined, in accordance with Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure) that the owner or operator is no longer required to maintain financial assurance for final closure of the facility.

(k) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, he may submit a written request to the executive director for release of the amount in excess of the current closure cost estimate covered by the trust fund.

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§37.211. Surety Bond Guaranteeing Payment for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining a surety bond which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure), and submitting an originally signed surety bond to the executive director.

(b) The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the United States Department of the Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.311 of this title (relating to Payment Bond).

(d) The bond must guarantee that the owner or operator shall:

(1) fund the standby trust fund as specified in §37.161 of this title (relating to Establishment of a Standby Trust) in an amount equal to the penal sum of the bond before the beginning of final closure of the facility; or

(2) fund the standby trust fund as specified in §37.161 of this title in an amount equal to the penal sum within 15 days after an administrative order to begin final closure issued by the executive director becomes final, or within 15 days after an order to begin final closure is issued by the United States district court or other court of competent jurisdiction; or

(3) provide alternate financial assurance as specified in this subchapter, and obtain the executive director's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the bond from the surety.

(e) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(f) The penal sum of the bond must be in an amount sufficient to satisfy the requirements for which financial assurance for closure is required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the penal sum of the bond plus the amount of the combined mechanism(s) must be at least equal to the current closure cost estimate.

(g) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts.

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§37.221. Surety Bond Guaranteeing Performance for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining a surety bond which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure), and submitting an originally signed surety bond to the executive director.

(b) The bond must, at a minimum, be among those listed as acceptable sureties on federal bonds in Circular 570 of the United States Department of Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.321 of this title (relating to Performance Bond).

(d) A surety bond guaranteeing performance of closure must guarantee that the owner or operator shall:

(1) perform closure in accordance with the closure plan or the closure requirements of the registration or permit for the facility whenever required to do so; and

(2) provide alternate financial assurance as specified in this section, and obtain the executive director's written approval of the assurance provided within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the bond from the surety.

(e) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. Following a determination by the executive director that the owner or operator has failed to perform closure in accordance with registration or permit requirements when required to do so, under terms of the bond the surety shall perform closure as guaranteed by the bond or shall deposit the amount of the penal sum of the bond into a standby trust, as specified in §37.161 of this title (relating to Establishment of a Standby Trust), as directed by the executive director to satisfy the financial assurance requirements.

(f) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation of the bond may not occur, however, during the 120 days beginning on the date of the receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts. If the owner or operator fails to provide an alternate financial assurance mechanism as specified in this subchapter within 90 days of the receipt of notice of cancellation from the surety to the executive director and to the owner or operator, and obtain written approval of the alternate assurance from the executive director, the surety shall be required to perform under the terms of the bond.

(g) The penal sum of the bond must be in an amount sufficient to satisfy the requirements for which financial assurance was required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the penal sum of the bond plus the amount of the combined mechanism(s) must be at least equal to the current closure cost estimate.

(h) The surety shall not be liable for deficiencies in the performance of closure by the owner or operator after the executive director releases the owner or operator from the requirements of this section, in accordance with Subchapter A of this chapter.

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§37.231. Irrevocable Standby Letter of Credit for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining an irrevocable standby letter of credit which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure), and submit an originally signed irrevocable standby letter of credit to the executive director.

(b) The financial institution issuing the irrevocable standby letter of credit shall be an entity that has the authority to issue irrevocable standby letters of credit and whose operations are regulated and examined by a federal or state agency.

(c) The wording of the irrevocable standby letter of credit must be identical to the wording specified in §37.331 of this title (relating to Irrevocable Standby Letter of Credit).

(d) The originally signed irrevocable standby letter of credit must be accompanied by a letter from the owner or operator referring to the irrevocable standby letter of credit by number, issuing institution, and date, and providing the following information: the commission registration or permit number, name and address of the facility, and the amount of funds assured by the irrevocable standby letter of credit by facility.

(e) The letter of credit must be irrevocable and issued for a period of at least one year. The irrevocable standby letter of credit must provide that the expiration date shall be automatically extended for a period of at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the executive director by certified mail of a decision not to extend the expiration date. Under the terms of the irrevocable standby letter of credit, the 120 days shall begin on the date when both the owner or operator and the executive director have received the notice, as evidenced by the return receipts.

(f) The irrevocable standby letter of credit must be issued in an amount sufficient to satisfy the requirements for which financial assurance is required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the amount of the letter of credit plus the amount of the combined mechanism(s) must be at least equal to the current closure cost estimate.

(g) Following a determination that the owner or operator has failed to satisfy the requirements for which financial assurance is required or with the registration or permit requirements when required to do so, the executive director may draw on the irrevocable standby letter of credit and deposit such funds into a standby trust for the closure of the facility.

(h) If the owner or operator does not establish alternate financial assurance as specified in this subchapter and obtain written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice from the issuing institution that it has decided not to extend the irrevocable standby letter of credit beyond the current expiration date, the executive director shall draw on the irrevocable standby letter of credit. The executive director may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last 30 days of any such extension, the executive director shall draw on the irrevocable standby letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this chapter and obtain written approval of such assurance from the executive director.

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§37.241. Insurance for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining insurance which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure), and submitting an originally signed certificate to the executive director.

(b) At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(c) The wording of the certificate of insurance must be identical to the wording specified in §37.341 of this title (relating to Certificate of Insurance).

(d) The insurance policy must be issued for a face amount at least sufficient to satisfy the requirements for which financial assurance for closure is required, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the face amount plus the amount of the combined mechanism(s) must be at least equal to the current closure cost estimate. Actual payments by the insurer shall not change the face amount, although the insurer's future liability shall be lowered by the amount of the payments.

(e) For a claims-made insurance policy, the owner or operator shall place in escrow, as instructed by the executive director, an amount sufficient to pay an additional year of premiums for renewal of the policy. When the owner or operator fails to provide an alternate financial assurance mechanism, the executive director may use these funds to renew the policy.

(f) The insurance policy must guarantee that funds shall be available whenever needed to fulfill obligations of the insured under this chapter. The policy shall also guarantee that once closure of a facility for which closure insurance was provided begins, the issuer shall be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the executive director, to such party or parties as the executive director specifies.

(g) After beginning closure of a facility, an owner or operator or any other person authorized to perform closure may request reimbursement for closure expenditures by submitting itemized bills to the

executive director. Within 60 days after receiving bills for closure activities, the executive director shall determine whether the closure expenditures are in accordance with the closure plan or the closure requirements, and if so, he shall instruct the insurer to make reimbursement in such amounts as the executive director specifies in writing. If the executive director has reason to believe that the cost of closure will be significantly greater than the face amount of the policy, he may withhold reimbursement of such amounts as he deems prudent until he determines, in accordance with Subchapters A and B of this chapter, that the owner or operator is no longer required to maintain general financial assurance requirements for the facility. If the executive director does not instruct the insurer to make such reimbursements, he shall provide the owner or operator with a detailed written statement of reasons.

(h) The owner or operator must maintain the policy in full force and effect until the executive director consents to termination of the policy by the owner or operator as specified in Subchapter A of this chapter. Failure to pay the premium, without substitution of alternate financial assurance as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary. Such violation shall be deemed to begin upon receipt by the executive director of a notice of cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration of the policy.

(i) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the mechanism of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with the date of receipt of the notice by both the executive director and the owner or operator, as evidenced by the return receipts.

(j) Cancellation, termination, or failure to renew may not occur and the policy shall remain in full force and effect in the event that on or before the date of expiration:

- (1) the executive director deems the facility abandoned; or
- (2) the registration or permit expires, is terminated, or revoked, or a new or renewal registration or permit is denied; or
- (3) closure is ordered by the executive director of the commission or by a United States district court or other court of competent jurisdiction; or
- (4) the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code; or
- (5) the premium due is paid.

(k) Each policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

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§37.251. Financial Test for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining a financial test or a financial test and corporate guarantee which conforms to the requirements of this section, in addition to the requirements specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure).

(b) To pass this test, the owner or operator must meet the criteria of either paragraph (1) or (2) of this subsection:

(1) the owner or operator must have:

(A) two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

(B) net working capital and tangible net worth each at least six times the sum of the current closure cost estimate, liability coverage requirements, and any other financial assurance obligations under the Texas Natural Resource Conservation Commission (TNRCC) or other federal or state environmental regulations assured by a financial test; and

(C) tangible net worth of at least \$10 million; and

(D) assets located in the United States amounting to at least 90% of the owner's or operator's total assets or at least six times the sum of the current closure cost estimate, liability coverage requirements, and any other financial assurance obligations under the TNRCC or other federal or state environmental regulations assured by a financial test;

(2) the owner or operator must have:

(A) a current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) tangible net worth at least six times the sum of the current closure cost estimate and liability coverage requirements and any other financial assurance obligations under TNRCC or other federal or state environmental regulations assured by a financial test; and

(C) tangible net worth of at least \$10 million; and

(D) assets located in the United States amounting to at least 90% of the owner's or operator's total assets or at least six times the sum of the current closure cost estimates, liability coverage requirements, and any other financial assurance obligations under TNRCC or other federal or state environmental regulations assured by a financial test.

(c) To demonstrate that the requirements of the test are being met, the owner or operator shall submit the following items to the executive director:

(1) a letter signed by the owner's or operator's chief financial officer worded identical to the wording specified in §37.351 of this title (relating to Financial Test). If an owner or operator is using the financial test to demonstrate both assurance for closure, as specified in Subchapter B of this chapter (relating to Financial Assurance Requirements for Closure) and liability coverage, he must submit the letter specified the Financial Test for Liability, Part B in §37.651 of this title (relating to Financial Test for Liability) to cover both forms of financial responsibility. A separate letter as specified in §37.351 of this title is not required; and

(2) a copy of the owner's or operator's independently audited year-end financial statements for the latest fiscal year including the "unqualified opinion" of the auditor; and

(3) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) he has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure, he found such amounts to be in agreement.

(d) After the initial submission of items specified in subsection (c) of this section, the owner or operator must send updated information to the executive director within 90 days after the close of each succeeding fiscal year. This information shall consist of all three items specified in subsection (c) of this section.

(e) If the owner or operator no longer meets the requirements of subsection (b) of this section, he shall send notice to the executive director of intent to establish alternate financial assurance as specified in this subchapter. The notice must be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator shall provide the alternate financial assurance within 120 days after the end of such fiscal year.

(f) The executive director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (b) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (c) of this section. If the executive director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (b) of this section, the owner or operator must provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

(g) The executive director may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements. An adverse opinion or disclaimer of opinion shall be cause for disallowance. The executive director shall evaluate other qualifications on an individual basis. The owner or operator shall

provide alternate financial assurance as specified in this subchapter within 30 days after notification of the disallowance.

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§37.261. Corporate Guarantee for Closure.

(a) An owner or operator may satisfy the requirements of financial assurance for closure by obtaining a written guarantee, hereafter referred to as "corporate guarantee," which conforms to the requirements of this section, in addition to the requirements as specified in Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure).

(b) The guarantor shall be the direct or higher-tier parent corporation of the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.251 of this title (relating to Financial Test for Closure). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.361 of this title (relating to Corporate Guarantee for Closure). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.251(c) of this title.

(d) The terms of the corporate guarantee shall provide that:

(1) if the owner or operator fails to perform closure of the facility covered by the corporate guarantee in accordance with the closure plan or the closure requirements whenever required to do so, the guarantor shall do so or establish a trust fund as specified in §37.201 of this title (relating to Trust Fund for Closure) in the name of the owner or operator;

(2) the corporate guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and the executive director. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts;

(3) if the owner or operator fails to provide alternate financial assurance as specified in this subchapter and obtain the written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor shall provide such alternative financial assurance in the name of the owner or operator.

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